Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Qwest Communications International Inc.	)	
	)	
Petition For Forbearance From Enforcement of the Commission's Circuit Conversion Rules As They Apply to Post-Merger Verizon/MCI and SBC/AT&T	)	WC Docket No. 05-294
	)	
(Petition For Forbearance Under 47 U.S.C. § 160(c))	)	

COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation ("BellSouth"), on behalf of itself and its wholly owned subsidiaries, hereby submits the following comments on the Petition for Forbearance filed by Qwest Communications International Inc. ("Qwest") on October 4, 2005. In its Petition, Qwest asks the Commission to forbear from enforcing an incumbent local exchange carrier's ("ILEC") obligation to convert special access circuits to UNEs when the conversion is made by SBC/AT&T or Verizon/MCI.

In submitting these comments, BellSouth's purpose is not to engage in the debate on the merits of Qwest's request. Instead, BellSouth takes this opportunity to address the root cause of Qwest's petition—an ILEC's obligation to convert existing special access services to UNEs. The Commission in its *Triennial Review Order*[1] and then again in its *Triennial Review Remand*

[1] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC

Order[2] determined that competitive LECs ("CLECs") could convert tariffed ILEC services, including special access services, to UNEs provided the CLEC satisfied any eligibility criteria. As discussed below, the conversion requirement lacks a sound statutory or public policy foundation. In the absence of a compelling reason favoring the requirement, its impact is to distort the competitive balance in the marketplace by conferring, through regulatory fiat, an unearned pecuniary boon on CLECs at the expense of ILECs.

DISCUSSION

By definition, a conversion can only occur if the requesting carrier is already using special access services to provide the services that it seeks to offer. If this were not the case, there would be nothing to convert. In these circumstances, a carrier that is already using special access services to provide the services it seeks to offer cannot be logically viewed as requiring high-capacity loops or transport on an unbundled basis in order to offer the services it already provides.

In formulating its guidance to the Commission, the Court of Appeals for the District of Columbia Circuit in its review of the Commission's *Triennial Review Order* laid out the analytical parameters concerning mandatory unbundling:

> [T]he purpose of the [1996] Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that the government may lawfully mandate. Rather, its purpose is to stimulate competition—preferably genuine, facilities-based competition. Where

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Docket Nos. 01-338, 96-98 & 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003) (subsequent history omitted) ("*Triennial Review Order*" or "*TRO*").

[2] *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 & CC Docket No. 01-338, *Order on Remand*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*").

> competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose costs of mandatory unbundling.[3]

With respect to the issue of conversions, the Court specifically noted that "the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates . . . precludes a finding that the CLECs are 'impaired' by lack of access to the element under § 251(c)(3)."[4]

Despite the clear directions provided by the Court, the Commission accepted arguments which at most amounted to anecdotal claims that special access was purchased because difficulties were encountered ordering UNEs. Such claims hardly demonstrate impairment. The only time that transmission facilities would be available as special access but not as UNEs would be when those facilities were not available at the time of the initial order and had to be built to satisfy the CLEC's special access service request. In such instances where facilities do not exist, the CLEC is as capable as the ILEC of building its own facilities to meet a customer's demand. Moreover, even if it were assumed that this situation occurred frequently, which it does not, it would also have to be assumed that CLECs have factored this circumstance into their planning and development of service offerings. Given that CLECs sign up new customers, the inescapable conclusion must be that even if a high percentage of the customers must be served with special access, the CLECs still would have a viable offering.[5]

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3 *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 576 (D.C. Cir.) ("*USTA II*"), *cert. denied*, 125 S. Ct. 313, 125 S. Ct. 316, 125 S. Ct. 345 (2004).

4 *Id*. at 593.

5 Furthermore, the Commission has reviewed and approved BellSouth's policies and provisioning practices regarding UNE loop and transport combinations. BellSouth's performance data conclusively demonstrates that BellSouth provides nondiscriminatory access to high-capacity UNEs. Moreover, the fact that some CLECs have chosen UNEs to serve over 90

The choice by CLECs to use special access services demonstrates that special access services provide a practicable alternative to UNEs and that conclusion is reinforced by the competitiveness of special access services. Special access competition ensures reasonable prices for the inputs to CLEC offerings. Such special access competition is not some nascent phenomenon. Competition for special access began well before the 1996 Act and grew such that even the Commission has described access competition as a "mature source of competition in telecommunications markets."[6]

Indeed, market performance consistently reflects the competitive nature of special access. For example, BellSouth's experience has been that carriers that use special access circuits typically take advantage of the discounted pricing plans offered by BellSouth. Many negotiate contract tariffs that include designer discounts, service measurements and guarantees that address market-defined needs. Furthermore, since the Commission relaxed it rate regulation of special access and permitted pricing flexibility, special access prices have declined approximately 14 percent.[7]

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percent of their customers belies any alleged claim that there is a significant problem in obtaining access to UNEs.

[6] *Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCC Rcd 9587, 9596, ¶ 18 (2000).

[7] *See* Letter from Bennett L. Ross, General Counsel-D.C., BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-313 (Dec. 7, 2004) ("BellSouth Dec. 7, 2004 *ex parte*"). BellSouth showed that the use of special access services varied considerably by carrier. As shown, in BellSouth's region, carriers such as Time Warner and US LEC, as well as AT&T and MCI, have relied heavily on special access circuits to serve business customers. Other carriers, implementing a different strategy, principally ordered UNE Loop and transport combinations and created connections equivalent to special access service. For example, BellSouth provided data showing that ATI and Talk America ordered over 90 percent of their high capacity services as UNEs, while XO and Xspedius order about 75 percent of such services as UNEs. Still other carriers have relied on their own network facilities to serve the business market. *See, e.g.*, UNE Fact Report 2004, prepared for and submitted by

Thus, special access provides CLECs with network inputs at prices that allow them to compete, precisely as the 1996 Act envisioned. In the face of these circumstances, conversions of special access to UNEs simply bestow upon CLECs a financial advantage in the form of an unwarranted price break. This policy amounts to nothing more than a wealth transfer from ILECs to CLECs without any pro-competitive or pro-consumer benefits. The Commission's UNE and special access policies should be aimed at setting ground rules that promote competition, not creating opportunities for regulatory arbitrage. Indeed, a regulatory mandate to "re-price" special access circuits at UNE rates creates a situation wherein the base of special access circuits would be subject to bulk conversion to UNEs predicated solely on exploitation of regulatory advantages. On the other hand, the appropriate dynamic would be for the competitive market to determine how quickly and how far such substitution goes, as customers react to various competitive offers. The Commission's current policy of allowing carriers to convert existing special access services to UNEs results in regulation, rather than the competitive market, creating the possibility of massive wealth transfer between carriers through a shift to unbundled facilities without any market constraint.

Equally significant is that public benefits from this wealth transfer are unlikely, given that it would occur where UNE facilities have proven unnecessary to compete for and win a customer. Because most large businesses that are served by special access enter into long term contracts for their telecommunications needs,[8] the mandated price breaks enjoyed by the carrier

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BellSouth, SBC, Qwest and Verizon, WC Docket No. 04-313 & CC Docket No. 01-338, at I-2, Table 1 (Oct. 4, 2004).

[8] For example, in its initial comments in WC Docket 04-313, AT&T Corp. noted that "[a]n important feature of the enterprise market is that large enterprise customers take service under multi-year term contracts." AT&T Comments at 129 (filed Oct. 4, 2004).

converting from special access to UNEs would flow for the term of the contract only to the carrier and not to the customer. Furthermore, the regulatory crafted approach to conversions that forces prices down to TELRIC levels carries with it the unfavorable consequence that economic incentives to invest in such facilities are substantially lessened.

Simply put, there is no legitimate legal or policy basis for the Commission's current conversion policy. The elimination of the conversion rule would not affect the availability of UNEs. Where UNEs are available based on the Commission's impairment test, carriers could choose to order UNEs to compete for customers currently served over special access arrangements. Where this competition occurs, it is very likely that the ILECs will continue offering advantageous pricing arrangements in order to avoid handicapping their special access customers relative to UNE providers. Where a discounted special access arrangement is not perceived as adequate, that carrier could order UNEs, but would have to pay the same charges and fees paid by other carriers seeking to install UNE circuits to serve that customer.

Eliminating the conversion or re-pricing requirement would simply force carriers to abide by their business decisions, which can hardly be viewed as an onerous requirement. Indeed, some CLECs have elected to purchase special access on a month-to-month basis, thereby forgoing the discounts associated with long-term contracts. For example, some facilities-based CLECs purchased approximately 70 to 80 percent of their special access circuits on a month-to-month basis, apparently mindful of the Commission's admonition that carriers "take into account the possibility of future conversions to UNE combinations" before entering into long-term contracts.[9]

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[9] BellSouth Dec. 7, 2004 *ex parte* at 8.

By contrast, some CLECs purchased approximately 90% of their special access pursuant to long-term contracts. These CLECs elected to enter into such contracts to avail themselves of deep discounts that are available with long-term agreements while forgoing the flexibility associated with month-to-month arrangements. Regardless of whether these CLECs could meet the Commission's current architecture test, requiring re-pricing at TELRIC of existing special access circuits is unjustified as a matter of law and policy.

Whatever business conditions influenced the CLECs' choices, the Commission should not interfere with the operation of the competitive market. As explained above, the conversion rules create a counterpoint to competitive outcomes. The pecuniary advantages conferred by the conversion rules interfere with the marketplace and obstruct the pro-competitive and pro-consumer benefits the Commission's policies always intended to foster.

Respectfully submitted,

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Date: January 9, 2006

CERTIFICATE OF SERVICE

I do hereby certify that I have this 9th day of January 2006 served the following with a copy of the foregoing **COMMENTS OF BELLSOUTH CORPORATION** via electronic filing and/or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed below.

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